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No. 96-1102

In the Supreme Court of the United States

OCTOBER TERM, 1996

SOUTH CAROLINA, ET AL., PETITIONERS

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ANN HUBBARD
Assistant to the Solicitor General
ALBERT M. FERLO, JR.
ETHAN G. SHENKMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Section 3006 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6926, authorizes the Environmental Protection Agency (EPA) to allow States to implement their own hazardous waste programs that are consistent with the federal program. Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9604(c)(9), as added by Section 104(k) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-449, 100 Stat. 1621, conditions the payment of certain cleanup funds within a State on EPA approval of the State's plan for long-term treatment or disposal of the hazardous wastes produced within its borders. The questions presented are:

1. Whether Section 3006 of RCRA or Section 104(c)(9) of SARA indicates an unmistakably clear congressional intent to allow States to discriminate against interstate commerce in hazardous wastes.

2. Whether South Carolina's cap on land disposal of hazardous wastes and its "demonstration of need" requirement for new and expanded hazardous waste facilities, both of which differentiate between in-state and out-of-state wastes, are "neutral" provisions that must be considered separately from other provisions of South Carolina's hazardous waste program.

3. Whether the district court abused its discretion in declining to refer this case to EPA under the "primary jurisdiction" doctrine.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondent Environmental Technology Council (formerly Hazardous Waste Treatment Council) brought this challenge under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, to a series of South Carolina statutory and regulatory provisions governing the treatment and disposal of hazardous wastes in that State. The district court granted a preliminary injunction against enforcement of the challenged provisions, Pet. App. 82a-104a, and that injunction was, in relevant part, upheld by the court of appeals, *id.*

at 50a-81a. The United States participated in that appeal as *amicus curiae* on behalf of respondent.[1]

On remand, the district court granted summary judgment for respondent and permanently enjoined the challenged provisions. Pet. App. 28a-49a. The court of appeals affirmed. *Id.* at 1a-27a. The United States did not participate in that second appeal.

1. South Carolina's Hazardous Waste Program

Five provisions of South Carolina's hazardous waste program have been invalidated. The first, Executive Order No. 89-17, issued in April 1989, declared that, because the "volume of hazardous waste disposed of in South Carolina is disproportionately out-of-state waste," and because other States have imposed "barriers and restraints against the disposal of hazardous waste within their own borders," hazardous waste treatment facilities in South Carolina are prohibited from accepting waste originating in a State that does not permit the disposal of that waste within its borders. Pet. App. 142a-147a. Under that provision, all generators of wastes in certain States were effectively "blacklisted" from using hazardous waste facilities in South Carolina.

The second provision, issued in July 1989, is Executive Order No. 89-25, which establishes quotas for the disposal in South Carolina of out-of-state wastes. Pet. App. 140a. That order requires all hazardous waste facilities to reserve a certain capacity for in-state wastes and to limit the capacity of wastes accepted from any single other State. *Ibid.*

The third provision, Regulation 61-99 of the South Carolina Department of Health and Environmental Control (DHEC), took effect in January 1990. It requires a "demonstration of need" before any applicant can receive a permit to establish or expand a

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[1] Respondent has lodged copies of that brief with this Court. Br. in Opp. 3 n.7.

hazardous waste management facility. Pet. App. 134a-137a. This need can be demonstrated only by reference to the volume of in-state wastes. *Id.* at 134a-136a.

The final two provisions are statutes enacted in 1989 and 1990. In Act No. 196 (1989 S.C. Acts 1575), the South Carolina legislature codified the "blacklisting" provision of Executive Order No. 89-17. Section 9 of the Act, codified at S.C. Code Ann. § 44-56-130(4)-(6) (Law. Co-op. Supp. 1996), prohibits facilities in South Carolina from accepting hazardous waste from generators in another State if that State has prohibited the treatment, storage or disposal of that waste within its borders or has not entered into an interstate or regional agreement for the safe treatment of hazardous wastes. Pet. App. 127a-128a. Section 5 of the Act, S.C. Code Ann. § 44-56-205 (Law. Co-op. Supp. 1996), codifies preferences for in-state wastes, providing that "[a]ll hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials." Pet. App. 127a.

Act No. 590 (1990 S.C. Acts 2495) discriminates against out-of-state wastes by establishing a floor for the disposal of in-state wastes and a ceiling for the disposal of out-of-state wastes. Section 2 of the Act, codified at S.C. Code Ann. § 44-56-60(a) (Law. Co-op. Supp. 1996), requires each hazardous waste facility in South Carolina to reserve for in-state wastes at least the same land disposal capacity that it allocated for in-state wastes during the previous year and limits the burial of out-of-state wastes to the amount buried during the previous year. Pet. App. 132a. Act No. 590 also sets a statewide cap on the total amount of hazardous waste that can be disposed of in South Carolina landfills, and provides that that cap can be exceeded by a showing related to the amount of in-

state, but not out-of-state, waste disposed of during the preceding year. *Ibid.* The legislative "findings" supporting Act No. 590 (see § 1, codified at S.C. Code Ann. § 44-56-59(A)(2)-(3) (Law. Co-op. Supp. 1996)) candidly state that it is "essential that [South Carolina's] limited waste treatment and disposal capacity * * * be preserved, ready and available to ensure that the needs of South Carolina are met first," and that hazardous waste treatment and disposal facilities in South Carolina "must give preference to hazardous waste generators within the State." Pet. App. 130a.

2. Federal Statutory and Regulatory Framework

South Carolina's hazardous waste laws were enacted against a backdrop of three federal statutes addressing the national problem of hazardous waste treatment, storage and disposal: the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6921-6939b; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*; and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-449, 100 Stat. 1613.

a. RCRA directs EPA to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment and disposal of hazardous wastes. See 42 U.S.C. 6922-6925. Under Section 3006 of RCRA, 42 U.S.C. 6926, EPA may authorize a State to implement its own hazardous waste program "in lieu of" the federal program, as long as the state program (1) is "equivalent to" the federal program, (2) is "not [in]consistent with" the federal program or other state programs, and (3) provides for "adequate enforcement" of compliance with federal requirements. 42 U.S.C. 6926(b). EPA regulations interpreting the "consistency" requirement state that:

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

40 C.F.R. 271.4(a).[2]

b. While RCRA provides hazardous waste disposal management standards, CERCLA primarily addresses abandoned and inactive waste disposal sites. CERCLA provides a mechanism for cleaning up contaminated sites, 42 U.S.C. 9606, and imposes the costs of the cleanup on those responsible for the contamination, 42 U.S.C. 9607. Under CERCLA, EPA may itself undertake response actions using the Hazardous Substances Superfund, 42 U.S.C. 9604, then seek to recover its costs from responsible parties, 42 U.S.C. 9607(a), or it can seek to require responsible parties to undertake response actions, through administrative orders or judicial injunction, 42 U.S.C. 9606(a).

c. As part of SARA, Congress enacted Section 104(c)(9) of CERCLA, which establishes state

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[2] In notices approving state programs, EPA has explained that RCRA Section 3006 does not require the agency to conduct a Commerce Clause analysis in determining whether a state program satisfies the "consistency" criterion. In the notice announcing final approval of South Carolina's RCRA program, EPA explained that it was "not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and decline[d] to do so here." 50 Fed. Reg. 46,437, 46,439 (1985) (Pet. App. 117a); see also 53 Fed. Reg. 16,264, 16,265 (1988) ("[T]he Agency does not believe that it is required either by 40 C.F.R. 271.4 or by RCRA Section 3006 to adjudicate the constitutionality of a state statute in the absence of any definitive judicial decision applicable to the statute at hand.") (approving Maine's program).

hazardous waste capacity requirements. 42 U.S.C. 9604(c)(9). This provision prohibits the United States from providing money for any remedial actions in a given State unless that State assures EPA that it has adequate capacity to treat, destroy, or dispose of the hazardous wastes projected to be produced in the state for a 20-year period. 42 U.S.C. 9604(c)(9)(A). This capacity need not be provided entirely within the State; it may also be provided by out-of-state facilities in accordance with "an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c)(9)(B).

3. EPA Approvals and Authorizations in South Carolina

Pursuant to RCRA Section 3006 and CERCLA Section 104(c)(9), EPA has authorized South Carolina to operate its own hazardous waste program and has approved its Capacity Assurance Plan (CAP), making it eligible for federal remedial cleanup funds.

a. EPA authorized South Carolina to operate its hazardous waste program under RCRA Section 3006 in 1985, several years before the five invalidated provisions took effect. See Pet. App. 110a. That 1985 review is EPA's only comprehensive evaluation of South Carolina's hazardous waste program and the only instance in which the agency has made explicit findings with respect to the "consistency" of any aspect of that program.[3] EPA did notify South

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[3] Before granting final authorization, EPA solicited public comment on whether a recently-enacted hazardous waste fee provision (not at issue in this case) should be deemed "inconsistent" under 40 C.F.R. 271.4 because it imposed a higher fee for land disposal of out-of-state hazardous wastes than for hazardous wastes generated in-state. See 50 Fed. Reg. 37,385 (1985). EPA ultimately determined that the fee provision satisfied the "consistency" criterion because the evidence showed that the fee did not "in fact" unreasonably restrict or

Carolina in 1989 of potential "consistency" problems with Executive Order No. 89-17, which requires that hazardous waste facilities give a preference to in-state wastes. In response to EPA's request, South Carolina's Attorney General submitted an opinion that the Order satisfied the "consistency" regulations. 1 C.A. App. 381a. EPA never responded to that opinion or took any further action.

Since then, in 1993, 1994, and 1995, EPA has approved three "clusters" of revisions and modifications to South Carolina's RCRA program.[4] None of EPA's approval notices specifically addressed or approved the provisions challenged in this case.

b. In May 1990, EPA approved South Carolina's CAP pursuant to CERCLA Section 104(c)(9). 1 C.A. App. 246. At that time, EPA's policy was to approve a plan if it met three criteria: it provided "reasonable assurance" that the State would have adequate capacity to manage its hazardous wastes for the next 20 years; it demonstrated the State's "commitment

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impede the free flow of hazardous wastes across state lines. Pet. App. 112a-113a.

[4] EPA's regulations establish procedures for submitting proposed revisions and modifications to EPA for approval. See 40 C.F.R. 271.21. In particular, States are required to modify their programs periodically to reflect changes in the federal RCRA program. 40 C.F.R. 271.21(e). These periodic submissions are referred to as "clusters." See 51 Fed. Reg. 33,712, 33,714 (1986). South Carolina's submissions that EPA approved in 1993, 1994, and 1995 were "clusters" designed to respond to changes in RCRA. While those submissions were never made part of the record in this case, EPA's approvals of those submissions appear at 60 Fed. Reg. 42,046 (1995); 59 Fed. Reg. 60,910 (1994); and 58 Fed. Reg. 7865 (1993).

EPA's regulations also establish procedures for withdrawing program authorization. See 40 C.F.R. 271.11-271.23. Neither the EPA nor any other party has initiated a withdrawal proceeding.

and capability to carry out the plan"; and it "document[ed] interstate and/or regional agreements for imports and exports." EPA Office of Solid Waste and Emergency Response, Directive 9010.00a (Oct. 16, 1989), at 2-3 (OSWER Directive). Although South Carolina attached copies of several of the challenged provisions to its CAP submission,[5] EPA's CAP review process did not require the agency to analyze, let alone approve, any of those provisions. Accordingly, EPA's approval letter stated simply that South Carolina's submission was acceptable for purposes of Section 104(c)(9) and that the State therefore would be eligible for federal cleanup funds. 1 C.A. App. 246.[6]

Although the decision in this case has enjoined specific provisions of South Carolina's laws that discriminate against out-of-state wastes, the State continues to operate its hazardous waste program. See 61 Fed. Reg. 18,502 (1996) (EPA approval of South Carolina's revisions to its hazardous waste program). In addition, it retains its eligibility under SARA to receive federal funds for remedial cleanup projects.

4. This Litigation

Respondent filed suit in June 1990, alleging that South Carolina's hazardous waste program violated the Commerce Clause and seeking injunctive relief. The district court granted respondent a preliminary injunction, enjoining the enforcement of each of the challenged South Carolina laws. Pet. App. 82a-104a.

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[5] Attached to South Carolina's 1989 CAP submission were copies of Act No. 196, Executive Order Nos. 89-17 and 89-25, and an interim version of DHEC Reg. 61-99. 1 C.A. App. 290, 333-369. Act No. 590 was not yet in effect.

[6] Less than two weeks later, in approving Alabama's CAP, EPA explained that its CAP review focused on issues of waste management capacity and did not include Alabama's list of "banned" or blacklisted States, which was "beyond the scope" of its review of Alabama's CAP. 1 C.A. App. 496.

It found that the intent and likely effect of the challenged provisions were to interfere with interstate commerce in hazardous waste, *id.* at 102a-103a, and it rejected petitioners' argument that the provisions were immune from Commerce Clause challenge because EPA had approved South Carolina's hazardous waste management program, *id.* at 101a. The court of appeals affirmed the district court's preliminary injunction, except as to DHEC Regulation 61-99, and it remanded the case. *Id.* at 50a-81a. The court of appeals concluded that respondent had a substantial argument that DHEC Regulation 61-99 violated the Commerce Clause, but directed the district court on remand to consider more fully the balance of hardships that would result from a preliminary injunction of that regulation. *Id.* at 64a.

b. On remand, the district court granted summary judgment for respondent on the ground that all five challenged provisions violated the Commerce Clause. Pet. App. 28a-49a. It analyzed the provisions as "five interrelated components," *id.* at 33a, "work[ing] together to compose an overall discriminatory program," *id.* at 44a, and found that the "actual purpose of the program was to discriminate," *id.* at 43a. It therefore rejected petitioners' efforts to salvage the allegedly "neutral" aspects of the land disposal quotas established by Act No. 590, holding that "a discriminatory program cannot be pursued into its otherwise valid but constituent parts." *Id.* at 46a (citing *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994)). In addition, it enjoined DHEC Regulation 61-99 as an "obvious effort to hoard the economic resources of [the] state and to isolate th[e] state from interstate commerce." *Id.* at 48a. The district court also denied petitioners' motion to stay the case and refer it to EPA under the "primary jurisdiction" doctrine, noting that the constitutional issues respondent raised were not "those to which EPA

could conceivably lend some degree of expertise." *Id.* at 29a.

c. The court of appeals affirmed. Pet. App. 1a-27a. It found no evidence in the language or legislative history of RCRA, CERCLA, or SARA to support petitioners' contention that "Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause." *Id.* at 13a-14a. It specifically rejected petitioners' argument that Congress contemplated that EPA's "consistency" regulations would displace a constitutional Commerce Clause analysis. *Id.* at 14a-15a. As an additional basis for rejecting that argument, the court concluded that, in any event, "EPA has not expressly approved any of the contested South Carolina laws." *Id.* at 17a; *id.* at 11a n.11 ("we disagree with South Carolina's contention that EPA has specifically addressed and authorized some of the challenged provisions").

Applying traditional Commerce Clause principles, the court concluded that the challenged provisions discriminate in effect and in purpose, Pet. App. 19a, and are not justified by any legitimate state concerns that could not be served by nondiscriminatory alternatives, *id.* at 20a-22a. In addition, it declined to sever and preserve the overall cap on land disposal of hazardous wastes imposed by Act No. 590 and the "needs" requirement imposed by DHEC Regulation 61-99, concluding that those provisions were "not as evenhanded and neutral as the state would have the court believe." *Id.* at 23a-26a. Alternatively, the court held that, even if Act No. 590's overall cap were nondiscriminatory, it would not be severable, under applicable principles of state law, from the unconstitutional portions of the Act. *Id.* at 24a n.21. Finally, the court of appeals held that the district court did not abuse its discretion by denying petitioners' motion to stay the case and refer it to

EPA under the "primary jurisdiction" doctrine. *Id.* at 27a.

DISCUSSION

"It has long been accepted that the Commerce Clause * * * directly limits the power of the States to discriminate against interstate commerce." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). Under this conception of the "negative" or "dormant" Commerce Clause, state actions that discriminate facially, in practical effect or in purpose, are subject to a "virtually *per se* rule of invalidity." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 454-455 (1992) (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)); *Camps Newfound/Owatonna* v. *Harrison*, No. 94-1988, 1997 WL 255351, at *16 (May 19, 1997). To sustain a discriminatory action, a State must demonstrate that the action "is demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co.*, 486 U.S. at 274, and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake," *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992) (quoting *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). These principles apply with full force to the interstate commerce in hazardous wastes. See, *e.g.*, *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389 (1994); *Oregon Waste Sys., Inc.* v. *Department of Envt'l Quality*, 511 U.S. 93, 100 (1994); *Chemical Waste Management*, 504 U.S. at 340 n.3; *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 & n.3 (1992); *Philadelphia*, 437 U.S. at 622-623.

Petitioners do not assert that the quotas on out-of-state wastes (Exec. Order No. 89-25), the "blacklisting" provisions (Act No. 196 and Exec. Order No. 89-17), the preference for in-state wastes (Act. No. 196), or the ceiling on the disposal of out-of-state

wastes and floor on the disposal of in-state wastes (Act No. 590) are nondiscriminatory. Nor do they challenge the court of appeals' conclusion that there are nondiscriminatory alternatives that would effectively address the State's legitimate concerns for the health, safety, and welfare of its citizens. Instead, petitioners assert that RCRA, CERCLA, and SARA somehow indicate Congress's intent to allow States to discriminate against interstate commerce in hazardous wastes. Pet. 12-26.

That argument fails for two reasons. First, as the court of appeals found, Pet. App. 17a, EPA has not specifically addressed or approved any of the South Carolina provisions at issue here. Accordingly, this case does not present the question whether actual EPA approval could be interpreted to show congressional intent to allow States to erect otherwise unconstitutional barriers to out-of-state wastes. Second, even if that question were properly presented here, the Fourth Circuit correctly held that nothing in RCRA, CERCLA, or SARA evinces an "unmistakably clear" congressional intent to allow state discrimination against interstate commerce. Petitioners' additional assertions are similarly without merit. Both lower courts correctly concluded that the overall cap on land disposal of hazardous wastes and the "needs" requirement improperly discriminate against out-of-state wastes, and both courts correctly rejected petitioners' contention that this matter should be referred to EPA under the "primary jurisdiction" doctrine. Because the court of appeals' decision that those five provisions of South Carolina's hazardous waste program impermissibly discriminate against interstate commerce in hazardous wastes is correct and does not conflict with any decision of this Court or of another court of appeals, further review by this Court is not warranted.

1. In the exercise of its plenary authority to regulate interstate commerce, Congress may authorize or validate a state law or regulation that would otherwise offend the Commerce Clause. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984). Congress's intent to do so, however, must be "expressly stated" or "unmistakably clear." *Id.* at 91; *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 373-374 (1994); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986); *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982); *C & A Carbone*, 511 U.S. at 408 (O'Connor, J., concurring). Petitioners contend, Pet. 15-23, that RCRA, CERCLA, and SARA demonstrate Congress's "unmistakably clear" intent to allow EPA to approve and thereby validate state hazardous waste programs that discriminate against out-of-state wastes. They further contend that, pursuant to those statutes, EPA expressly approved the five South Carolina provisions challenged here. Pet. 24-26; Reply Br. 4-7.

a. We address petitioners' second contention first. As the Fourth Circuit found, Pet. App. 17a, EPA has not expressly approved any of these challenged provisions. Nor has it made any findings as to their "consistency." The only time EPA has evaluated South Carolina's overall program for consistency, equivalency, and enforcement capabilities was in 1985 when it granted final authorization for South Carolina's hazardous waste program. At that time, none of the challenged provisions was in effect. Of the 1993, 1994, and 1995 EPA approvals of modifications to South Carolina's program, only the 1995 approval notice mentions one of the challenged provisions, and then only in a context unrelated to discrimination against out-of-state wastes. See 60 Fed. Reg. 42,046, 42,048, 42,049, 42,050 (1995). As the court of appeals correctly noted, Pet. App. 11a n.11, the 1995 approval notice cited S.C. Code Ann. § 44-56-60(a), the section amended by Act No. 590, only for its relevance

to other aspects of the federal program (*e.g.*, location standards for salt domes, salt beds, underground mines, and caves). Thus, nothing in the record indicates that South Carolina sought, or that EPA granted, approval for the specific provisions challenged here, and the question whether EPA's approval of a state provision under the regulatory "consistency" standard should affect judicial scrutiny of that provision under the dormant Commerce Clause is not properly presented.

Nor did EPA's approval of the State's CAP submission in 1990 "focus" on the effects of the challenged authorities on interstate commerce, as petitioners claim. Pet. 23 & n.14. EPA's 1990 CAP review was a narrow one, focusing solely on the State's capacity to handle wastes generated *in-state*, not on its laws governing the treatment or disposal of *out-of-state* wastes. In measuring that capacity, EPA considered only in-state waste facilities and out-of-state capacity guaranteed by "an interstate agreement or regional agreement or authority." 42 U.S.C. 9604(c)(9)(B).[7] Thus, in approving South Carolina's CAP submission, EPA did nothing more than deter-

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[7] As we explained in our *amicus* brief in the court of appeals, the narrow scope of the CAP review made consideration of provisions designed to reduce out-of-state wastes irrelevant:

> In effect, for purposes of determining whether a state has met its capacity assurance obligation, EPA assumes that there are no imports except those that occur pursuant to an interstate or regional agreement. * * * Thus, because the provisions of South Carolina law at issue here are directed at reducing the total amount of interstate waste imported for treatment, storage, or disposal, not at changing the terms of its interstate agreements with respect to capacity, these provisions were not relevant to EPA's approval of South Carolina's capacity assurance plan.

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mine that South Carolina had made adequate arrangements for the disposal or storage of wastes generated within its borders. It did not review, much less approve, the State's policies with regard to out-of-state wastes.[8]

b. Even if the question whether EPA approval would displace judicial Commerce Clause analysis were properly presented for this Court's review, it is clear that nothing in RCRA, CERCLA, or SARA suggests any congressional intent to permit States to discriminate against interstate commerce in hazardous wastes.

i. Petitioners contend, Pet. 15-18, that Congress has intentionally displaced the dormant Commerce Clause by delegating to EPA, under Section 3006 of RCRA, 42 U.S.C. 6926, the authority to authorize States to operate hazardous waste programs. See Pet. 15-18. That argument finds no support in the statute or in this Court's decisions. It has been rejected by the Fifth Circuit, see *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058, 1059-1060 (1992), cert. denied, 506 U.S. 1080 (1993), as well as the court below, with no contrary decisions from any other court of appeals.

While RCRA Section 3006 authorizes EPA to allow a State to administer and enforce its own hazardous waste program "in lieu" of the federal program, nothing in RCRA indicates that Congress contemplated that EPA would permit States to enact programs that discriminate against out-of-state wastes. To the contrary, the most natural interpretation of RCRA's

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[8] In claiming otherwise (Pet. 23 n.14), petitioners misread a 1988 EPA guidance document, which clarifies that EPA would use the procedures for withdrawal of a State's RCRA program, rather than the CAP review process, to address problems with "unreasonable restrictions on interstate waste movements." Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues (Dec. 23, 1988) (Pet. App. 123a-124a).

requirement that state programs be consistent throughout the nation is that Congress did not intend for the States selectively to discriminate against each other or to isolate themselves from interstate commerce in hazardous wastes. This interpretation is reflected in EPA's determination that "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban" on interstate commerce of hazardous wastes is inconsistent with the integrated national program Congress intended. 45 Fed. Reg. 33,465 (1980); 40 C.F.R. 271.4(a). EPA's "consistency" determinations are, of course, directed to questions arising under the statutes it administers; the agency does not purport to adjudicate constitutional questions under the dormant Commerce Clause. Nor has Congress directed it to do so.

Moreover, RCRA expressly contemplates that States will enter into compacts for "cooperative effort and mutual assistance for the management of * * * hazardous waste." 42 U.S.C. 6904(b)(1). This cooperation is the antithesis of discrimination, protectionism, or retaliatory barriers to the interstate shipment of hazardous wastes. At the very least, "the fact that Congress has been willing to let the States settle their differences over [hazardous wastes] through mutual agreement [does not] constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase*, 458 U.S. at 960 (quoting *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982)).[9]

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[9] Indeed, if Congress had intended to authorize such discrimination against interstate commerce in hazardous wastes, or to allow EPA to validate discriminatory programs, it could have said so explicitly. In the Low-Level Radioactive Waste Policy Act, 42 U.S.C. 2021b-2021j, for example, Congress expressly authorized States that enter into compacts for the operation of regional radioactive waste disposal facilities to ban

RCRA differs markedly from programs that this Court has found to reflect a congressional intent to authorize state or local action that otherwise would violate the Commerce Clause. In *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983), the Court upheld a municipal order reserving jobs for city residents in a community development program where the federal program regulations "affirmatively permit[ted] the type of parochial favoritism expressed in the order." In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 150 & n.21 (1982), the Court concluded that Congress had "convincingly" "articulate[d]" its intention that certain taxes imposed by Indian tribes on nonmembers "do not threaten its latent power to regulate interstate commerce." And in *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159, 172 (1985), the Court found "no other conclusion but that Congress contemplated that some States might partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation." RCRA, by contrast, provides no indication whatsoever that Congress intended either directly to authorize States to discriminate against interstate commerce or to authorize EPA to validate discriminatory state programs.

ii. Petitioners err in relying, Pet. 18-19, on CERCLA's capacity assurance provision, Section 104(c)(9). Contrary to petitioners' contention, the CAP provision does not "direct" States to enter into interstate or regional agreements; it is merely a

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radioactive waste shipments from States that fail either to enter into a regional compact or to meet federal deadlines for establishing their own facilities. 42 U.S.C. 2021e(e)(2) and (f)(1). Under RCRA, the only consequence of a State's failure to submit a "consistent" plan is that the State must abide by the federal plan.

planning provision that recognizes that a State may assure adequate hazardous waste capacity based *either* on facilities within its own borders *or* on available facilities in other States pursuant to an interstate or regional agreement or authority. 42 U.S.C. 9604(c)(9)(B). In any event, if a State wishes to guarantee access to private hazardous waste facilities as part of an interstate or regional agreement, it can do so through nondiscriminatory means, such as contracting with private facilities. Far from evincing an "unmistakably clear" intent to authorize discrimination against out-of-state waste, Section 104(c)(9) reflects Congress's goal of encouraging interstate cooperation and discouraging the balkanization of a national problem. See *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Envt'l Management*, 910 F.2d 713, 721-722 (1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir.) (the capacity assurance provision does not authorize discrimination against interstate commerce), cert. denied, 501 U.S. 1206 (1991).

2. Nor is review warranted of the lower courts' refusal to sever and uphold two allegedly "neutral" aspects of these provisions. One is the provision in Act No. 590 that reduces the annual statewide cap on land disposal of hazardous waste to 120,000 tons for the 12 months ending July 1, 1991, and to 110,000 tons for each 12 months thereafter. See Pet. App. 131a-132a. Although this cap, standing alone, does not differentiate between out-of-state and in-state waste, it does not stand alone. It is accompanied by a provision for exceeding those limits based on volumes of in-state, but not out-of-state, wastes. See Act No. 590, § 2 (allowing cap to be exceeded if at least 110,000 tons of hazardous wastes from *in-state* generators were buried during the previous year) (Pet. App. 131a-132a). The court of appeals' refusal to assess this one aspect of Act No. 590 in isolation is consistent with this

Court's precedents. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). The court independently ruled that the provision was not severable under South Carolina law, Pet. App. 24a n.21, and that state law determination does not warrant this Court's review. Of course, nothing in the court of appeals' opinion prohibits South Carolina from reenacting the statewide disposal cap without discriminatory provisions for exceeding it.

The court of appeals invalidated South Carolina's "needs regulation" (DHEC Reg. 61-99) because it defines "need" in a manner that clearly favors in-state generators at the expense of out-of-state generators. Pet. App. 24a-26a. That holding is based on a straightforward application of this Court's dormant Commerce Clause jurisprudence, see, *e.g.*, *Oregon Waste Sys.*, 511 U.S. at 99 ("differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" are "virtually *per se* invalid"), and therefore does not merit further review.

3. Finally, petitioners err in contending, Pet. 28-30, that the case should have been referred to EPA under the "primary jurisdiction" doctrine. That doctrine provides federal courts with a discretionary tool "designed to coordinate administrative and judicial decisionmaking by taking advantage of agency expertise." Pet. App. 26a (citing *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956)). The district court found no unresolved issues of fact and declined to refer to EPA questions of constitutional law, which are appropriate for resolution by an Article III court and are not a matter of agency expertise. *Id.* at 29a. The court's ruling was particularly appropriate in this case because EPA already had submitted an *amicus* brief expressing its views on both legal and factual issues. Accordingly, the court of appeals

correctly concluded that the district court did not abuse its discretion[10] in denying petitioners' motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ANN HUBBARD
Assistant to the Solicitor General
ALBERT M. FERLO, JR.
ETHAN G. SHENKMAN
Attorneys

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[10] Contrary to petitioners' contention, Pet. 29-30, courts of appeals have consistently applied an abuse-of-discretion standard to such determinations. See, *e.g.*, *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994). Nor would a more stringent standard of review warrant a different result on this point.